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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1777~~ 70-233

ROBERT H. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC.,
Petitioners,

vs.

INTERNATIONAL INDUSTRIES, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, ROBERT J. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit") rendered in these proceedings on January 14, 1971, and the order of that Court issued March 4, 1971 denying petitioners a rehearing. This petition is limited solely to that part of the opinion and judgment of the Eighth Circuit determining that the trial court, the United States District Court for the Western District of Missouri, properly denied petitioners' prayer that respondents be enjoined from evicting petitioners.

OPINIONS BELOW

The opinion of the Eighth Circuit, and the order of that Court denying rehearing, neither of which has been reported yet, appear at Appendices A and B, infra, pp. A1 and A7, respectively. (Petitioners have filed with this Court their separate appendix originally filed with the Eighth Circuit. References to that appendix will be in the following form—"A. 29". References to the appendix being filed initially with this brief will be in the following form—"App. B, infra, p. 7". Petitioners have also furnished to this Court copies of Appellants' Brief, Appellants' Reply Brief, and Appellants' Petition for Rehearing, all addressed to the Eighth Circuit. Any references to these documents will be clearly marked.) The opinion of the trial court is unreported and appears at App. C, infra, p. A9.

JURISDICTION

The Judgment of the Eighth Circuit (App. A, infra, p. A1) was entered on January 14, 1971. A petition for rehearing, timely filed, was denied on March 4, 1971. (App. B infra, p. A7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the claims of a franchisor-lessor for goods and services furnished to its franchisee-tenant, for purposes of determining the franchisor-lessor's rights to terminate the license agreement and premises lease between the parties and to enforce such terminations by unlawful detainer action in state courts, are severable from the franchisor-

licensor's claims against the franchisee-licensee for renounced and unfurnished illegally tied services—

(1) where the franchisee-licensee was financially unable to timely pay for the furnished goods and services because of monetary losses suffered as a direct result of the illegal tying arrangements imposed upon it by the franchisor-lessor, or

(2) where such unlawful detainer action is being used as a tool to enforce the franchisor-lessor's illegal tying arrangements.

CONSTITUTIONAL AND STATUTORY RULES INVOLVED

Article III, Section 2, Clause 1, of the Constitution of the United States provides, in pertinent part, as follows:

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising * * * between Citizens of different States * * *."

Section 16 of the Clayton Act, 15 U.S.C. § 26, 38 Stat. 737, states:

§ 16. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction

may issue: *Provided*, That nothing herein contained shall be construed to entitle any persons, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

STATEMENT OF THE CASE

In two consolidated actions for treble damages against International Industries, Inc., and two of its wholly-owned subsidiaries (these three corporations, who are the respondents to this petition, will be referred to collectively as "International") pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, by Robert J. Helfenbein and two corporations in which he was the sole stockholder and the principal operating officer, Circle Investments of Missouri, Inc. ("Circle"), and Crescent Investments of Iowa, Inc. ("Crescent"), the plaintiffs sought to enjoin International from pursuing eviction and arbitration actions against the three plaintiffs pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. (A. 4, 22, 23, 26, 39, 40). The injunction is also sought pursuant to the general equitable powers of the Court under Article III, Section 2, Clause 1 of the Constitution of the United States "to make more effective the relief provided in the antitrust statutes." *Bateman* v. *Ford Motor Co.*, 302 F.2d 63, 65, 66 (3rd Cir.). The principal allegation of plaintiffs' complaints is that International imposed certain tying requirements on them in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. § 14).

Circle, under assignment from plaintiff Helfenbein, owns the franchise to operate the International House of Pancakes ("IHOP") restaurant at 6501 Troost, Kansas City, Missouri. Crescent, also under assignment from Plaintiff Helfenbein, owned the franchise to operate an IHOP restaurant in Des Moines, Iowa. (Ex. 1, p. 1). (Exhibits 1 through 15, inclusive, were before the Eighth Circuit, and are in one binder. Exhibits 16 through 29 are being furnished initially with this petition, and are in a separate binder.) Crescent was evicted from the Des Moines Restaurant on or about May 18, 1969. (A. 33). Therefore, eviction issues with respect to Crescent are now academic. Also, the three plaintiffs have decided to rely on the decision of the Eighth Circuit to the effect that they may raise in court their anti-trust defenses to the arbitrable issues after any awards (App. A, infra, p. A3), and on the indicated willingness of International to raise such arbitrable issues as counter-claims in the District Court. (App. A, infra, p. A3, fn. 1). Therefore they no longer seek to enjoin International from arbitration. The only parties to this petition, therefore are Helfenbein and Circle, whom we will refer to collectively as "Helfenbein."

Helfenbein signed the licensing documents with respect to the Kansas City store on August 17, 1966. These licensing documents consist of a License Agreement (Ex. 1-B), an Equipment Lease (Ex. 1-D), and a Sub-Lease of the premises (Ex. 1-F), all on forms printed by International. The various documents were so integrated that a violation by the licensee under only one of them could result in a revocation of all three. Article VIII of the License Agreement (Ex. 1-B) provides for cancellation of the franchise in the event the licensee breaches its terms. Article II of the premises sub-lease (Ex. 1-F) provides for cancellation of the sub-lease in the event the franchise is terminated. Likewise, Article II of the Equipment Lease

(Ex. 1-D) provides for termination of that lease upon termination of the Sub-lease. The licensee's financial obligations to International under the two leases are incorporated into paragraphs A(1)-A (3), Article IV, of the License Agreement. Article XIII of the License Agreement provides for arbitration in Los Angeles, California of all disputes that could arise between the parties, reserving to International however, the unlimited right to apply to "any court of competent jurisdiction for appropriate writs for recovery of possession of the premises" without first proceeding to arbitration.

Helfenbein has alleged and offered unrebutted evidence that International illegally tied the purchase or lease of substantially all goods and services required for the operation of his Kansas City IHOP restaurant (with the exception of that normally provided by hired employees) to the purchase of the IHOP license and the lease to operate that restaurant, and that he has been substantially overcharged for such goods and services. (Ex. 1, pp. 2-5; Ex. 1-B, p. 3; Ex. 1-D).[1] The evidence clearly indicates that International was receiving rebates from Helfenbein's "approved suppliers." (Ex. 7-11, inclusive). The trial judge stated at the hearing on the injunction issue "* * * I find, first, that there is a substantial likelihood of success in the plaintiff's case here." (Tr. 59, 60).

Helfenbein was unable to timely pay his financial obligations to International, which was not only his franchisor, but also the landlord of his restaurant, the lessor of substantially all of his furniture, equipment and fixtures, his almost exclusive supplier, and his bookkeeper. Upon the advice of counsel, as of February 5, 1968, Helfenbein under-

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1. See pages 7 and 8 of Appellant's Brief to the 8th Circuit for a more detailed description of the tying requirements.

took prospectively to pay International timely for goods purchased and for premises and equipment rental, and renounced those portions of the License Agreement which required him to purchase all food and restaurant supplies and certain services from International. He has, with inconsequential differences that he has offered to resolve, timely paid International premises and equipment rental, and bills for food and other goods, since February 5, 1968. (Ex. 1, pp. 2-4, 7, 8; A. 75, 76).

The unrebutted evidence offered by Helfenbein was that "it was and is financially impossible for me and my two corporations to operate our IHOP restaurants profitably and pay the defendants as required by the contract." This evidence included computations by Helfenbein's accountant showing overcharges by International totalling $82,600 from the opening of each restaurant through February 28, 1969. The Des Moines restaurant opened on or about December 1, 1965 and the Kansas City restaurant on or about January 16, 1967. (Ex. 1, pp. 1-4; Ex. 2).

Since renouncing the various tying agreements, Helfenbein's remaining restaurant has prospered, with its profits growing each accounting period, as illustrated by the following summarization. (Exs. 16, 17, 18, 19 and 20).

	Nine mos. Ended Sep. 30, 1967*	Fiscal Year Ended September 30, 1968	1969	1970	6 Months Ended Mar. 31, 1971
Net sales—foodstuffs	$155,400	$231,200	$243,400	$275,100	$149,900
Purchases	55,400	74,700	68,200	76,100	40,600
Percentage of Purchases to Net Sales—foodstuffs	35.6%	32.3%	28.0%	27.1%	26.2%
Executive Salary (To Helfenbein)	3,600	8,000	11,200	16,100	10,400
Net Profit (Loss) Before Income Taxes	(9,200)	12,800	13,800	13,900	17,500
Total Executive Salary and Net Profit	(5,600)	20,800	25,000	30,000	27,900

*Restaurant opened on or about January 16, 1967.

On or about March 5, 1969, International mailed a notice to Helfenbein notifying him that the License Agreement, Equipment Lease and premises sub-lease with respect to his Kansas City IHOP restaurant were terminated, and that the premises should be vacated on or before March 15, 1969. The terminations were based upon claimed failure to pay equipment and premises rent, franchise fee, "service and advertising charges," "suppliers' bills", and "violation of standard procedures." (Ex. 1-M). International was the only "supplier" involved. (Ex. 5).

As of March 31, 1969, International claimed that a total of $75,000 was due from Helfenbein's two restaurants for goods and services. $45,000 represented charges for goods and services purportedly furnished prior to February 5, 1968. $30,000 represented charges for post-February 5, 1968 renounced services which were not furnished. In addition, International accelerated the payment terms of Helfenbein's license fee note on the Kansas City restaurant, and claimed $11,300 principal and interest as being due as of March 31, 1971. (A. 71-75).

The injunction was denied by the trial court. (App. C, infra, p. A11). The Eighth Circuit affirmed the trial court (App. A, infra, p. A6), and denied Helfenbein's petition for rehearing. (App. B, infra, p. A8). International filed an unlawful detainer action in the Magistrate's Court for the Fourth District of Jackson County, Missouri on April 14, 1971 (Ex. 21), Helfenbein's petition for stay of mandate having been denied by the Eighth Circuit. (8 C.A., Tr., p. 26). The unlawful detainer petition omitted reference to the illegally tied services which were not paid.

REASONS FOR GRANTING THE WRIT

I.

The Issues Involve Important Questions of Federal Law: (A) Because of the Importance of Franchising in the American Economy; (B) Because of the Common Complaints That Franchisors Illegally Require Franchisees to Purchase Tied Goods and Services and Wrongfully Terminate Their Franchises; (C) Because There Has Been a Substantial Loss to the Economy, Especially Small Businessmen Franchisees Arising Out of Such Abuses; and (D) Because the Application of Traditional Legal Concepts by the Courts Has Often Resulted in Injustice to Franchisees in Franchising Cases, Especially Those Involving Franchise Termination.

Section 2(a) of S. 2507, 90th Congress, 1st Session,[2] a bill introduced by the Honorable Senator Eastland on October 5, 1967, states as follows:

> FINDINGS AND DECLARATION OF POLICY
>
> SEC. 2. (a) The Congress hereby finds that because of the substantial growth in the distribution of goods and services through utilization of the franchise system, in industries engaged in commerce or activities affecting commerce, which system is presently estimated to account for 10 per centum of the Nation's gross national product and 25 per centum of all retail sales that the interest of approximately four hundred thousand small franchisees requires that the great dis-

2. Copies of S. 2321, 90th Congress, 1st Session, S. 2507, 90th Congress, 1st Session, S. 1967, 91st Congress, 1st Session, and S. 3844, 91st Congress, 2d Session, all dealing with franchisor-franchisee relationships, have been appended as Exs. 22, 23, 24 and 25, respectively.

> parity in economic power now heavily weighted in the favor of franchisors be reduced by providing that the franchisor must deal in a fair and equitable manner with its franchisees as to all aspects of the franchise relationship; and that the existing judicial remedies to afford relief to franchisees from injurious practices or franchisors are limited, ineffective, and too costly and franchisees should be provided with a means of simple, direct, and full legal relief against franchisors failing to deal in a fair and equitable manner.

S. 2507 was not reported out of committee. The foregoing findings, however, are indicative of the growth of the franchising business in recent years, and of the corresponding growth of franchisor abuses of franchisees. Consideration should be given also to the background and content of the other bills introduced in the Senate recently regarding franchisee-franchisor relationships which are referred to in Footnote 2, supra, p. 9.

In a Senate Committee Report recently issued[3] (sometimes herein referred to as "the report"), franchising was described as "one of the most dynamic and rapidly growing features of our business economy." Statistics were admitted to be scarce, but the reporting committee estimated "franchising has reached a level of at least $90 billion in annual sales and may now be approaching $100 billion * * *" and that there were "between 450,000 and 600,000 franchise units operating in the country today." (Report, p. 5).

The report also states, however (l.c. p. 6):

> "The rapid growth of franchising in recent years has left the way open to unscrupulous utilization of this marketing concept. Franchise abuses of a fraudulent

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3. Report No. 91-1344, 91st Cong., 2d Sess., "Impact of Franchising on Small Business," Report of the Select Committee on Small Business United States Senate on the Impact of Franchising on Small Business, etc.

> and deceptive character are significant enough to warrant Federal legislation designed to eliminate them."

It was reported that many franchisees suffered from franchisor abuses similar to those alleged in the case on appeal, such as failure to furnish promised services, excessive price markups on illegally tied products and services, and unreasonable and arbitrary termination of franchise agreements and leases. (Report, pp. 13, 14).

At page 23, the report stated "The committee feels that one of the more serious problems facing franchisors is the matter of 'tie-ins,' * * *. Tie-ins have been one major source of complaint brought to the attention of the committee." The heart of Helfenbein's complaint against International involves the tying elements of its license agreements and related contracts.

Without explanation, the report also stated (l.c. p. 12): "It appears to the committee that the concept of franchising is not completely understood by the judiciary or the various state regulatory and enforcement agencies." We submit, however, that the testimony on January 22, 1971 of the Honorable Philip A. Hart, U. S. Senator from the State of Michigan, provides a clue. On page 273 of Part 1 of the Report of Hearings (regarding "The Impact of Franchising on Small Business") before the Subcommittee on Urban and Rural Economic Development of the Select Committee on Small Business, United States Senate, Senator Hart's testimony is reported as follows:

> "Senator HART. Last fall a New York Supreme Court justice was faced with a decision incongruous on its face. His dilemma: should he honor the law or administer justice?
>
> "The case involved a gasoline dealer who had performed well for 5 years in his franchised outlet. Then the parent company decided he wanted the location

for another use. Therefore, the dealer was out of business—and without livelihood, refund of his investment in the building or payment for the goodwill he had worked hard to build up.

"In turning down the dealer's appeal for relief, Justice Joseph F. Gagliardi commented almost bitterly, and these are his words:

> 'It has been the sacredness of contractual obligations which has prevented courts of equity from imposing justice in many circumstances.'

"And he went on to suggest that this was exactly such a circumstance.

"I do not think Justice Gagliardi was faced with a one-of-a-kind set of circumstances. In fact, I know he was not.

"The Senate Antitrust and Monopoly Subcommittee held very lengthy hearings on franchising, and we had a whole list of stories comparable to the situation that confronted the New York justice.

"What they demonstrate most clearly is that calling a franchisee 'an independent businessman' today too often is a sham.

"* * *

"As I said, the complaints of franchisees over the present situation were spelled out in chapter and verse before the Antitrust Subcommittee. One thing was clear after the echoes of those hearings had subsided: franchisees are doing a lot of things under the threat of loss of franchise that they do not like to do."

The point is this. The courts are following traditional legal concepts regarding contracts, landlord-tenant relationships, etc. in regulating relations between franchisors and franchisees, but the imposition of these traditional concepts to present day relations between franchisor and franchisee very often does not make it possible to render a fair and just decision. It is apparent, especially after reading Senator Hart's testimony, that franchisors in gen-

eral are using the courts to enforce their control over their franchisees, often times for illegal purposes. In Helfenbein's case, International is trying to involve him in multiple litigation and remove him from his restaurant because of his express inability and unwillingness to abide by International's tying agreements. The courts have recently responded to the complaints of tenants in other types of retaliatory eviction cases. See, for example *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied 393 U.S. 1016 (1969); *Javins* v. *First National Realty Corp.*, 248 F.2d 1071 (D.C. Cir. 1970); *Schweiger* v. *Superior Court of Alameda County*, 90 Cal. Rptr. 729 (Cal. Sup. 1970). They are recognizing that there are some important rights of tenants that must be considered and weighed against the time honored rule that landlords have an unqualified right to evict a tenant at the expiration of his lease or to terminate a lease for non-payment of rent.

The Congress, as aforesaid, and various state legislatures have taken note of the numerous franchisor abuses of their franchisees, and there is a plethora of legislation that has been either enacted or is presently under consideration.[4] An examination of this legislation and proposed legislation indicates a deep concern with wrongful franchise terminations.

As of the date the Report was written, there was a "definite information gap concerning all vital statistics and economic benchmarks relevant to franchising." (Report, p. 17). Counsel is not aware of any reports, surveys, etc.

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4. Report, pp. 24-27; see also McGuire, State Franchising Regulations, the Conference Board Record, Oct. 1970, p. 29, a copy of said article being appended as Ex. 29; footnote 2, supra.

that have been published since the Report that would be relevant to this petition.[5]

Appellants are in a position to provide some meaningful statistics with regard to the turnover rate among IHOP franchisees. In a survey of what counsel understands is that part of the United States most densely populated with IHOP franchises, the following statistics were compiled (pp. 4-6, Ex. 26, and Exhibits "13", "13A" and "13B" *attached thereto*):

A. As to the average number of franchisees per restaurant—

1. Average number of franchisees per restaurant during period of January 1, 1964 through May 1, 1969 2.075

2. Twelve (12) stores had only one (1) franchisee operator during the subject period, including No. 904 which was permanently closed September 2, 1968, and No. 906, which Defendants took over on June 5, 1967 and never resold. Sixteen (16) stores had two (2) franchisees, nine (9) stores had three (3) franchisees, and three (3) stores had four (4) franchisees.

B. As to the average tenure of franchisees in these restaurants—

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5. At pages 17 and 18 of the Report mention is made of a study concerning the effect of franchising on the economy, on small business, and on franchisor-franchisee relationships to be published by the University of Wisconsin under commission from the SBA. That report, which was scheduled for publication in February, 1971, has not yet been published and is anticipated sometime this Summer. Counsel has requested an advance copy, and may consider filing a supplemental brief, but prefers not to request an extension of time in order to make use of such report in this petition. The activity generated in Congress and in the numerous state legislatures regarding the problems besetting the franchising industry, as herein discussed, speaks for itself.

1. There were a total of sixty-nine (69) new franchisees who were licensed to operate the thirty-nine (39) included restaurants during the period from January 1, 1964 through May 1, 1969.

2. At least thirty-two (32) of the sixty-nine (69) new franchisees were terminated during the subject period. These thirty-two (32) franchisees had an average tenure of 20.23 months.

3. Thirty-seven (37) of the sixty-nine (69) new franchisees were in operation of their store at May 1, 1969. These franchisees had an average tenure of 26.54 months.

4. Seventeen stores had only one new franchisee during the covered period, fourteen stores had two new franchisees, seven stores had three new franchisees, and one store had four new franchisees.

The above statistics are qualified to the extent stated in Exhibit 26. The raw data from which they were compiled was furnished by International.

The Report refers to unreasonable and arbitrary termination of franchise agreements as a common franchisor abuse. (Report, p. 13). To add to those cited before the District Court in Exhibit 26, consider the allegations contained in the complaint in *Beckstead, et al.* v. *International Industries, Inc., et al.*, No. 993376, Superior Court of the State of California in and for the County of Los Angeles. (Ex. 27). In the cited case, eight individuals who are franchised by International to operate restaurants known as The Original House of Pies ("TOHOP"), complaint that International has imposed upon them numerous restraints of trade in violation of California law, such as tying agreements, exclusive purchasing arrangements, price fixing, etc. As in the case on appeal, the Beckstead plaintiffs were each required to sign three integrated and preprinted docu-

ments entitled "Franchise Agreement," "Lease" (or "Sublease") (of the restaurant premises), and "Equipment Lease." It was alleged, in each instance where one of the plaintiffs objected to the various restraints, International, among other things recriminated with notices of default and threatened litigation seeking immediate possession of their restaurants unless the Beckstead plaintiffs agreed to "sell out" to International upon International's unsecured promise to pay them "nominal and inadequate sums of money," International, in fact has taken action against some of the Beckstead plaintiffs who refused International's demand that has resulted in the destruction of their businesses. (Ex. 27, pp. 8-13).

In Helfenbein's brief to the Eighth Circuit he claimed that his efforts to prosecute anti-trust damages would be intentionally frustrated if International would be permitted to pursue its eviction action in state court, citing *Bergen Drug Company* v. *Parke, Davis & Company*, 307 F.2d 725, 728 (3rd Cir.). (App'ts Br., pp. 39, 40). In reply, the Eighth Circuit stated: "Plaintiffs only remotely allude to their potential 'loss or damage' by reason of a violation of the federal law." (App. A, infra, p. A5). If the evidence before the courts below with respect to the site control provisions in the licensing agreements, the admitted exercise by International of control over its franchisees (Ex. 3, pp. 5-7), and the use of such controls against Helfenbein, then we urge consideration of the other evidence more recently revealed in the Beckstead complaint. To say it will be easy for a franchisee undergoing eviction action, much less one who has in fact been evicted from his IHOP Restaurant, to get active IHOP franchisees to testify for him in litigation against International is naive, especially when International selects these franchisees on the basis of their willingness to do as they are told by International. (Ex. 3, p. 6).

Appellants contend that the economic loss wrought by small businessmen franchisees of International alone who have been forced out of business by International, either by unlawful detainer actions, or by threat of same and subsequent repurchase at a bargain price is in and of itself a vast sum. This is made possible by the use of the scheme of integrated agreements that were signed by Helfenbein in the case on appeal, by the Beckstead plaintiffs, and by what Helfenbein contends to be numerous other franchisees of International all over the country, as may be inferred from the data revealed in Exhibit 26.

This Court has previously stated its concern to "recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses" (*Brown Shoe Co.* v. *U. S.*, 370 U.S. 294, 344) is so overriding that anti-competitive conduct "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference in the economy." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212. Even so, as a direct result of site control provisions in franchising contracts such as those in the case on appeal that permit the destruction of "viable, small, locally owned businesses," large franchisors are able to perpetuate their illegal trade restraints at the expense of their individual small businessman franchisees.

The franchisors are able to do this because of the interpretation by the courts below of this Court's decisions in cases such as *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 750 (1947), which held "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them," and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). Both of these decisions were relied upon by the Eighth Circuit herein. (App. A, infra, pp. A1, A5). Helfenbein does not take issue with the validity of the de-

cisions, only with their applicability to the facts in the case on appeal.

Helfenbein is not in any way relying upon the Federal antitrust laws to avoid payment of any indebtedness to International. Reliance upon state laws for such purposes is admitted, but that is entirely irrelevant to the issue.[6] His position is simply that the merits of International's claims supporting International's unlawful detainer action are so integrated with the merits of Helfenbein's antitrust action that it is inequitable and unjust to require Helfenbein to defend an entirely independent action in state courts in order to save his business. There is no reason the eviction issues cannot be raised before the District Court, and decided after full trial on the merits. Helfenbein has an equitable defense to the eviction action in that (1) the delinquencies in payment to International which underlie the action were a direct result of the illegal restraints imposed by International and (2) International was using the eviction action to rid itself of a franchisee who was no longer willing or able to abide by its tying restrictions and resulting overcharges, thereby perpetuating its illegal scheme. To require Helfenbein to have his equitable defense heard in the state courts in effect requires him to try two antitrust cases, and puts him at a severe disadvantage against his much bigger adversary. This is inconsistent with the expressed desire to favor such plaintiffs as a private class of Attorneys General. Further and more importantly, the courts thereby become parties to the prohibited conduct. *Continental Wall Paper Co.* v. *Louis Voight and Sons Co.*, 212 U.S. 227 (1909).

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6. Helfenbein's reliance upon the antitrust statutes of the states of Missouri and Iowa is discussed at pages 23-30 of Appellants' Brief to the Eighth Circuit.

If Helfenbein loses his antitrust case on the merits, he undoubtedly will lose his restaurant. However, if he wins, then he will be entitled to substantial damages, in effect a recoupment of the overcharges that originally put him in a position to be evicted, and he should then be able to set-off or pay any delinquency to International found owed and avoid loss of his business. The injunction sought will not make any indebtedness he may have to International "uncollectible" as comprehended by the decisions in *Bruce's Juices* (supra) and *Kelly* (supra). It will merely defer collection for the equitable purposes stated, thereby permitting him to fully develop his case. *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464.

Franchisees throughout the whole country faced with a predicament similar to that faced by Helfenbein are numerous. They deserve a clarification of this Court's decisions in *Bruce's Juices,* supra, and *Kelly,* supra, that will eliminate the harshness and inequities of such decisions to those in the same boat as Helfenbein.

II.

The Decision of the Eighth Circuit Is in Conflict with the Decisions of This Court and Other Circuits in Holding As Severable the Claims of International for Purportedly Furnished Goods and Services, on the One Hand, and for Illegally Tied Services Which Were Renounced by, and Not Furnished to, Helfenbein, on the Other.

The threatened eviction is based upon nonpayment by Helfenbein of certain charges by International. Some of the charges related to goods and services purportedly furnished, and some relate to illegally tied, unwanted and unfurnished services Helfenbein was required to obtain (but didn't) from International pursuant to renounced provisions in his License Agreement. An essential premise of

the January 14, 1971 decision of the Eighth Circuit (App. A, infra, p. A5) was that International had furnished to Helfenbein all of the goods and services for which he had been charged. The Eighth Circuit's error in this regard was called to that Court's attention in appellants' Petition for Rehearing at pages 1 and 2. The Eighth Circuit's order denying rehearing stated (App. B, infra, p. A8):

> "* * * Plaintiffs assert that the amounts due for rent, franchise payments and services received are *inseverable* from defendants' claim for payment for the alleged illegal tie-in requirements. We disagree. Plaintiffs have offered to pay for these items, both in the trial court and in this court, on the condition that an injunction issue to prohibit arbitration and eviction arising from the default on the other amounts contested. This offer serves as ethical proof of severability. Plaintiffs' original complaint (paragraph No. 33) demonstrates that their initial refusal to pay for rent, franchise payments, goods and services received arises from many other factors. It is obvious that plaintiffs early attempted to coercively use its refusal to pay past due accounts in order to preemptorily relieve themselves of the alleged tie-in requirements. To now allow plaintiffs to pay conditional on the grant of an injunction would make this court a party to that coercion. This we refuse to do."

The foregoing statement requires correction. Appellants' offer was as follows:

> "* * * to pay up all past due premises rent, equipment rent, and franchise fee payments, to keep current on these items and on all other sums due the International parties for purchase of food and restaurant supplies, and to post a $10,000 bond, if the court would restrain eviction from the Kansas City restaurant only and would restrain the institution of arbitration proceedings against all the Helfenbein parties. (A. 77, 78)."

(App'ts Br., pp. 12, 13). The past due premises rent has been paid (Ex. 28), and arbitration is no longer at issue. The offer was originally made as a *suggestion* to the District Court of a means of achieving equity, keeping in mind the power of that court to prescribe conditions for any injunction that it might issue. The delinquency occurred, as previously stated, as a direct result of the burden on Helfenbein of paying International the overcharges arising out of the illegal tying arrangements. The hearing at which counsel made the above-quoted statement occurred over one year after Helfenbein renounced the illegal tying requirements. He had been able to accumulate some funds during that period, and was then in a position to make the suggestion. The Eighth Circuit apparently thought counsel was wrong to adopt these tactics. The alternative would have been to pay up the delinquencies as promptly as money could be accumulated, despite the constant threat of eviction from Helfenbein's only source of livelihood, and the prospect that he might be compensated for his loss only after engaging in protracted and expensive litigation with International, a multi-million dollar corporation. And the money could have been accumulated only if Helfenbein continued to forego payment for the renounced services. These tactics could hardly be called "coercion."

Helfenbein's contention is and was that International's claims for furnished goods and services and their claims for unfurnished services are inseverable for purposes of determining whether or not International should be enjoined from evicting Helfenbein from the Kansas City restaurant. If one of the substantial reasons for the proposed eviction is nonpayment of the claims for the illegally tied and unfurnished services, then eviction should be enjoined. (App'ts Br., pp. 36, 37). The Eighth Circuit holding that such claims are severable is in conflict with:

(a) The following cases, all discussed at pages 35 and 36 of appellants' brief to the Eighth Circuit, and all holding that the use of otherwise legal site control provisions in contracts is an illegal means of effecting anti-competitive results: *F.T.C.* v. *Texaco, Inc.*, 393 U.S. 223, 227; *Simpson* v. *Union Oil Co.*, 377 U.S. 13; *Sahm* v. *V-1 Oil Company*, 402 F.2d 69 (10th Cir.); and *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.); and

(b) the following cases, all discussed at pages 36 and 37 of appellants' brief to the Eighth Circuit, and all holding to the effect that, in order to prove causation in a Federal antitrust treble damage action, it is normally sufficient to prove that the defendant materially contributed to plaintiff's injury: *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 702; *Momand* v. *Universal Film Exchanges, Inc.*, 172 F.2d 37, 43 (1st Cir.), cert. denied 336 U.S. 967; and *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798, 805-806 (1st Cir.).

Appellants recognize that all of the above decisions deal with damage suits and not with temporary injunctions. In that respect only this case is novel to those cited. But must a franchisee have both the ability and willingness to pay a franchisor currently for all goods and services pendente lite in order to avoid unlawful detainer litigation in state courts that in any event will tend to sap his strength and resources, and may lead to his eventual removal from his only source of livelihood, while he litigates his antitrust claims in the Federal courts? This Court has declared its policy of granting certiorari where rulings by a court of appeals "threaten the effectiveness of private action as a vital means of enforcing the antitrust policy of the United States." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 136. See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.* ..... U.S.

..... (1971). The decisions of the courts below certainly do threaten the effectiveness of private action by all franchisees in the position of Helfenbein, and we suggest there are many, as evidenced by the foregoing comments in this petition.

A decision by this Court resolving the inconsistencies between the decisions of the courts below with the cited decisions of this Court and various appellate courts is needed as a guide to the numerous other franchisees who are victims of contracts of adhesion with their franchisors on the procedures they should follow if they find themselves in the same boat as Helfenbein, and a favorable decision to Helfenbein will help stem the substantial economic losses of these small businessmen who have been forced by their franchisor-landlord out of their franchises, either by means of eviction or forced sale at disadvantageous terms.

CONCLUSION

This case is illustrative of the turmoil existing today in the franchising industry, especially with regard to the wrongful termination of franchises and eviction of franchisees by franchisors. Here the termination and eviction is wrongful because: (1) Helfenbein was so burdened with overcharges arising out of the illegal tying requirements of International that he could not timely pay his premises rent and other financial commitments to International; and (2) the attempted termination and eviction are in substantial part, attributable to Helfenbein's unwillingness and former inability to continue to bear the burden of the illegal tying requirements, which he renounced. The use of otherwise legal procedures, here franchise termination and unlawful detainer action in state court, to

enforce International's claim for payment for goods and services furnished, is inseverable from the overcharges that initially caused Helfenbein's delinquencies, and his renunciation of the tied services that were not furnished.

Small businessmen franchisees are suffering substantial losses as a result of wrongful termination of their franchises, and the courts below require guidance from this Court on methods of achieving fair and just results in litigation arising out of such terminations. Of equal importance is the need to resolve the inconsistencies of the decision in the case on appeal with other decisions of this Court and other circuits.

The issues raised in this case are therefore deserving of the attention of this Court.

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